

FEDERAL COURT OF AUSTRALIA

Salopal v Minister for Immigration and Border Protection [2018] FCA 1308

Appeal from: *Salopal v Minister for Immigration and Border Protection* [2017] FCCA 3081

File number: WAD 645 of 2017

Judge: **COLVIN J**

Date of judgment: 28 August 2018

Catchwords: **MIGRATION** - appeal from a judgment of the Federal Circuit Court upholding decision of Tribunal refusing visa application - application refused on grounds that Trades Recognition Australia skills assessment document was a 'bogus document' - meaning of requirement in Public Interest Criteria 4020 that there be 'no evidence' that the appellant had 'given, or caused to be given' to the Department a bogus document - whether primary judge erred in finding that the Tribunal did not commit jurisdictional error - whether Tribunal failed to consider a substantial claim advanced by the appellant - whether Tribunal discharged its statutory function - whether Tribunal's decision was unreasonable - where Tribunal failed to evaluate the evidence of three witnesses relied upon by the appellant to corroborate his account - jurisdictional error - appeal allowed - matter remitted to the Tribunal differently constituted for determination according to law

Legislation: *Administrative Appeals Tribunal Act 1975* (Cth)
Migration Act 1958 (Cth) ss 363, 476
Migration Regulations 1994 (Cth) Part 886 Schedule 2

Cases cited: *AAMI5 v Minister for Immigration and Border Protection* [2015] FCA 804; (2015) 231 FCR 452
Applicant WAEF v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 184; (2003) 236 FCR 593
Arora v Minister for Immigration and Border Protection [2016] FCAFC 35; (2016) 238 FCR 153
Ashraf v Minister for Immigration and Border Protection [2018] FCAFC 50
Avon Downs Pty Ltd v Federal Commissioner of Taxation [1949] HCA 26; (1949) 78 CLR 353

CQG15 v Minister for Immigration and Border Protection
[2016] FCAFC 146; (2016) 253 FCR 496

DAO16 v Minister for Immigration and Border Protection
[2018] FCAFC 2

Gill v Minister for Immigration and Border Protection
[2017] FCAFC 51; (2017) 250 FCR 309

Hossain v Minister for Immigration and Border Protection
[2018] HCA 34

*Malek Fahd Islamic School Ltd v Minister for Education
and Training (No 2)* [2017] FCA 1377

Minister for Immigration and Border Protection v Aulakh
[2018] FCAFC 91

Minister for Immigration and Border Protection v Nguyen
[2017] FCAFC 149; (2017) 254 FCR 522

Minister for Immigration and Border Protection v Singh
[2014] FCAFC 1; (2014) 231 FCR 437

Minister for Immigration and Border Protection v Stretton
[2016] FCAFC 11; (2016) 237 FCR 1

Minister for Immigration and Border Protection v SZVFW
[2018] HCA 30

Minister for Immigration and Citizenship v SZIAI [2009]
HCA 39

Minister for Immigration and Multicultural Affairs v Eshetu
[1999] HCA 21; (1999) 197 CLR 611

Minister for Immigration and Multicultural Affairs v Yusuf
[2001] HCA 30; (2001) 206 CLR 323

*Murad v Assistant Minister for Immigration and Border
Protection* [2017] FCAFC 73; (2017) 250 FCR 510

*NABE v Minister for Immigration and Multicultural and
Indigenous Affairs (No 2)* [2004] FCAFC 263; (2004) 144
FCR 1

O'Brien v Komesaroff [1982] HCA 33; (1982) 150 CLR
310

Patel v Minister for Immigration and Border Protection
[2015] FCAFC 22

*Re The Minister for Immigration and Multicultural Affairs;
Ex parte Durairajasingham* [2000] HCA 1

Saeed v Minister for Immigration and Citizenship [2010]
HCA 23; (2010) 241 CLR 252

Singh v Minister for Immigration and Border Protection
[2017] FCAFC 220; (2017) 255 FCR 135

Singh v Minister for Immigration and Border Protection
[2018] FCAFC 52

Soliman v University of Technology, Sydney [2012] FCAFC
146; (2012) 207 FCR 277

Sun v Minister for Immigration and Border Protection
 [2016] FCAFC 52; (2016) 243 FCR 220
SZQPY v Minister for Immigration and Border Protection
 [2018] FCA 359
SZUGL v Minister for Immigration and Border Protection
 [2015] FCA 868
Trivedi v Minister for Immigration and Border Protection
 [2014] FCAFC 42; (2014) 220 FCR 169
Viane v Minister for Immigration and Border Protection
 [2018] FCAFC 116
Verma v Minister for Immigration and Border Protection
 [2018] FCAFC 87
Wei v Minister for Immigration and Border Protection
 [2015] HCA 51; (2015) 257 CLR 22
Zhang v Minister for Immigration and Border Protection
 [2016] FCA 921

Date of hearing:	12 June 2018 and 3 August 2018
Registry:	Western Australia
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	118
Counsel for the Appellant:	The Appellant appeared in person assisted by an interpreter
Counsel for the First Respondent:	Mr PR MacLiver
Solicitor for the First Respondent:	DLA Piper Australia
Counsel for the Second Respondent:	The Second Respondent filed a submitting notice save as to costs

Table of Corrections

7 November 2018	At [118] the word 'occurred' in the second line has been amended to correctly state 'incurred'.
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ORDERS

WAD 645 of 2017

BETWEEN: **HARPREET SINGH SALOPAL**
 Appellant

AND: **MINISTER FOR IMMIGRATION AND BORDER**
 PROTECTION
 First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

JUDGE: **COLVIN J**

DATE OF ORDER: **28 AUGUST 2018**

THE COURT ORDERS THAT:

1. 1. The appeal be allowed.
2. 2. The orders of her Honour Judge Riley made on 12 December 2017 be set aside and in lieu thereof there be orders:
 - (a) (a) in the nature of certiorari, that the decision of the second respondent made on 17 July 2015 to affirm the decision of a delegate of the first respondent to refuse the appellant's application for Subclass 886 Skilled (Residence) (Class VB) visa be set aside; and
 - (b) (b) in the nature of mandamus, that the matter be remitted to the second respondent differently constituted for further consideration and determination according to law.
3. 3. There be liberty to the appellant to apply for costs orders in respect of the appeal or the proceedings before the Federal Circuit Court or both within 30 days.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

COLVIN J:

1 1 Mr Harpreet Singh Salopal (also known as Harpreet Singh) has been working as a pastry cook in Australia for many years. He wants to keep working in Australia. He has a Bachelor of Science degree from Punjab University. In 2008, after studying in Australia at Della International College and St George Institute, he applied for a Skilled (Residence) (Class VB) visa.

2 2 For the purposes of his visa application, Mr Salopal made an application to Trades Recognition Australia (**TRA**) for a skills assessment as a pastry cook. In support of the application to TRA he provided a letter from Pastry Art Design stating that he had completed 914 hours of work as a pastry cook from 20 January 2007 until 10 February 2008. The skills assessment application was successful.

3 3 The skills assessment by TRA was provided to the Minister in support of Mr Salopal's visa application which thereafter was under consideration for over six years. On 11 November 2014, a decision was made by a delegate of the Minister refusing his application. The application was refused on the basis that the TRA skills assessment was a 'bogus document'. It was said to be bogus because the delegate reasonably suspected it was obtained because of a false or misleading statement made to TRA that Mr Salopal had worked 900 hours at Pastry Art Design. An issue as to the *bona fides* of the letter appears to have been raised formally with Mr Salopal in a letter from the Minister's Department dated 12 July 2010. At that time, he was given an opportunity to respond to those concerns.

4 4 The concerns about the hours worked at Pastry Art Design stemmed from an investigation by the Department that had resulted in admissions by Mr Carmine Amarante, a former teacher at Della International College. Mr Amarante admitted that he had been involved in creating fraudulent documents for skilled migration purposes which included work reference letters from approximately 40 different employers. Mr Amarante said that Mr Ploumidis from Pastry Art Design was an employer who had been involved. He also said that a few of the students for whom he arranged work references actually worked at Pastry Art Design, but he did not know how many hours they had completed.

5 5 Mr Salopal claimed that he was one of those who had worked at Pastry Art Design and that the record of hours in the letter that had been provided about him was correct.

Criteria concerning bogus documents

6 As to the issue whether the TRA skills assessment was a bogus document, one of the requirements to be met by Mr Salopal in order to obtain the visa he sought was Public Interest Criteria 4020(1) (**PIC 4020(1)**), which applied under then Part 886 of Schedule 2 to the *Migration Regulations 1994* (Cth). PIC 4020(1) was expressed in the following terms:

There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

- (a) the application for the visa; or
- (b) a visa that the applicant held in the period of 12 months before the application was made.

7 The requirement was introduced by the *Migration Amendment Regulations 2011 (No 1)* (Cth). By regulation 5 of those amending regulations, the requirement applied in relation to pending applications for a visa as at 2 April 2011.

8 A bogus document is defined as a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person;
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

9 The requirements concerning bogus documents can be waived if the Minister is satisfied that there are compelling circumstances that affect the interests of Australia or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen: Public Interest Criteria 4020(4).

Review by the Tribunal

10 Mr Salopal sought review of the refusal of his visa application in the Migration Review Tribunal. As a result of legislative changes, the application was ultimately determined by the tribunal member as a member of the Administrative Appeals Tribunal. The Tribunal affirmed the decision not to grant him a visa.

11 11 In evidence before the Tribunal was an unsigned letter found on a USB stick belonging to Mr Amarante. The letter had the logo of Pastry Art Design and it contained the same dates of working as Mr Salopal had claimed, namely 20 January 2007 to 10 February 2008 and the same number of hours worked, namely 914. It was put to Mr Salopal that it seemed to be identical to the letter that he had provided to TRA, except it had not been signed (para 24, point 7).

12 12 It then emerged before the Tribunal that the ABN and one of the telephone numbers on the letter submitted by Mr Salopal to TRA were both different from the letter seized from Mr Amarante (para 30). The errors were in the signed version provided to TRA. The version found in the possession of Mr Amarante had the correct details.

13 13 When Mr Salopal was asked to make submissions as to why the existence of the letter in the possession of Mr Amarante (together with other matters) should not lead the Tribunal to conclude that Mr Salopal had asked for a false reference letter without completing 900 hours of work, the response by the migration agent emphasised the significance of the differences between the two letters (paras 36 and 37).

14 14 The Tribunal summarised the position as follows (para 37):

It was argued that *the* only reasonable explanation for this situation is that the version submitted to TRA was the original, which contained the incorrect ABN and telephone number. The original somehow ended up in the possession of Mr Amarante who then corrected the telephone number and ABN and used the document as a precedent to issue other, false references. The Tribunal considers that this is one possible explanation. Another possible explanation is that there were two different versions of the bogus document. One contained the correct telephone number and ABN and it was found in Mr Amarante's possession; the other one did not and it was provided to TRA.

15 15 I observe that the second explanation would be more plausible if the version with errors had been found in the possession of Mr Amarante and the corrected version signed and provided to TRA. That is because it would be unusual to keep a corrected version, but sign and send a draft. For that reason, there was much to commend the submission advanced on behalf of Mr Salopal. Consequently, it was necessary to pay close attention to any other evidence as to whether Mr Salopal worked the required number of hours at Pastry Art Design in order to make a fair and reasonable determination as to whether the information in the letter provided to the TRA was correct.

16 16 As to the evidence of Mr Ploumidis supporting Mr Salopal, the Tribunal (amongst other reasons concerning his evidence) noted that it was mindful that there have been cases in which Mr Ploumidis did not appear to support applicants who claim to have worked at Pastry Art Design. The Tribunal then stated that it did not logically follow that every person whom Mr Ploumidis supports completed at least 900 hours work (para 50).

17 17 The Tribunal considered in some detail the account given by Mr Salopal, the terms of a written statement of Mr Amarante and statements made to the Tribunal by Mr Ploumidis when he was called on his mobile phone during the course of the hearing.

18 18 Ultimately, the Tribunal accepted that Mr Salopal did some work at Pastry Art Design (para 63). It then concluded that the version of events advanced for Mr Salopal did not negate the existence of evidence of an alternative version that Mr Amarante was paid to produce a bogus document (para 64). The Tribunal found that upon 'considering the totality of the evidence' Mr Salopal did not complete 900 hours of work and that he procured a false reference letter (para 65). It then stated that the Tribunal 'reasonably suspects that the TRA skills assessment was obtained because of a false statement contained in the reference letter, namely, that Mr Salopal had completed 900 hours of work at Pastry Art Design and therefore the skills assessment is a bogus document (para 65). The Tribunal then stated (in terms reflecting PIC 4020(1)) that:

The Tribunal is not satisfied that there is no evidence before it that the applicant gave to the Minister or an officer a bogus document within the meaning of subsection (c) of the definition of 'bogus document' ... namely the TRA assessment.

19 19 It also decided that the requirements for the waiver of PIC 4020(1) had not been met.

20 20 It can be seen that the Tribunal's decision rested upon an affirmative finding 'on all the evidence' that Mr Salopal did not complete 900 hours of work at Pastry Art Design. This reflected the terms in which the Tribunal had earlier expressed the issue that it was required to decide, namely 'whether the applicant had indeed completed 900 hours of work *or* less at Pastry Art Design' (para 21).

21 21 Significantly, there was no separate reasoning to support any view about whether there was 'no evidence' that Mr Salopal gave to the Minister or an officer a bogus document. The Tribunal's reasoning in that regard rested only upon its finding that Mr Salopal did not complete 900 hours. It was that finding that was used to reject Mr Salopal's version of events explaining the existence of the corrected letter in the possession of Mr Amarante.

Evidence advanced on behalf of Mr Salopal before the Tribunal

22 22 Mr Salopal's account before the Tribunal was to the effect that he worked at Pastry Art Design on Wednesdays from 2.00-7.00 pm, Fridays for five hours and on Saturdays for seven hours. He identified certain dates in March and April when he did not work. He also relied upon a book of notes of recipes that he said he had prepared during his time at Pastry Art Design and the fact that he had subsequently been employed for a number of years as a pastry cook being work of a kind that he would not have been able to secure if he had not received considerable instruction over many hours.

23 23 As I have noted, Mr Ploumidis gave evidence to support Mr Salopal's claims before the Tribunal. He provided two statutory declarations in which he said that Mr Salopal did work the required hours of voluntary experience and that the letter was signed by Mr Ploumidis and was authentic. The Tribunal in its reasons, considered that evidence in some detail and pointed out its views as to the difficulties with that evidence for the case being advanced by Mr Salopal.

24 24 However, there was other evidence concerning whether Mr Salopal had worked 900 hours at Pastry Art Design.

25 25 First, there was a statement from Mr Karfut, the manager of Pastry Art Design in which he said that Mr Salopal successfully completed over 900 hours of volunteer work experience as a pastry cook from 20 January 2007 to 10 February 2008. In the statement he said 'I fully vouch for his experience in the bakery'. It provided a telephone number where he could be contacted.

26 26 Second, there was a statement from Ms Pimblet as follows:

I confirm that I am working at Pastry Art Design for long time and [Mr Salopal] has worked in the bakery almost one year during Jan 2007 to Feb 2008.

[Mr Salopal] used to work with me in the pastry section. I taught him cake decoration, imprinting names on cakes etc. I appreciated him always about his quick learning skill. I wish him best for his future'.

27 27 A mobile number was provided for Ms Pimblet.

28 28 Third, there was a statement from Mr Gaur Singh who said that he worked in the Pastry Art Design Bakery during 2006 to 2008. He said that he worked with Mr Salopal 'so many times during the year 2007 to 2008. Bakery used to be extremely busy on weekends

especially on Saturday. So, I used to work with [Mr Salopal] on Saturday morning shift'. He also provided a mobile number.

29 29 Fourth, after a telephone call from the Tribunal, Mr Ploumidis provided a further written statement in the following terms:

To clarify the way in which hours were awarded I am aware that volunteer trainees who used to work in my bakery often kept their own records and the college maintained its own records based on the days and hours they used to attend the bakery. Volunteer trainees who used to work in my bakery were also recorded with my managers and these were checked against the College's Teachers and owners of the college records before issuing any letters.

When a student would claim to have completed the hours or the College notified the bakery that the person had completed the hours I would check with my managers then report it to the relevant College. In the case of Della International and other colleges where I understand [Mr Salopal] and other students completed there [sic] Certificate III I would be notified to sign the relevant work reference.

30 30 This additional statement dealt with certain difficulties that had been raised by the Tribunal in the course of the oral hearing when Mr Ploumidis was questioned.

31 31 As to the additional evidence from these witnesses, the Tribunal said at para 18:

After lodging the application for review, the applicant provided further written evidence from himself, Mr Ploumidis and other people who are employed at Pastry Art Design (Angela Pimblet and Michael Karfut) and a friend (Gaur Singh) in support of his claim to have completed more than 900 hours of work at Pastry Art Design.

32 32 After considering in detail the evidence of Mr Salopal and Mr Ploumidis the Tribunal said in its reasons (para 62):

The Tribunal has considered the entirety of the evidence before it, from the applicant, Mr Ploumidis and a number of other witnesses, the applicant's 'calendar' and recipe book, and photos.

33 33 There was no other reference to the evidence supporting Mr Salopal's evidence that he did work at Pastry Art Design. There is no indication that an attempt was made to contact the other witnesses by telephone in the manner in which the Tribunal dealt with Mr Ploumidis.

Particular submissions advanced to the Tribunal on behalf of Mr Salopal

34 34 A migration lawyer prepared two submissions in support of the application for review by the Tribunal. The first submission was provided before the hearing. It dealt with reasons why the evidence of Mr Ploumidis should be accepted. It stated that there was ample

evidence to confirm that Mr Salopal worked at Pastry Art Design, submitted that more weight should be placed on the evidence of Mr Ploumidis than that of Mr Amarante and referred to attached supporting documents. Those documents included the three statements from other employees at Pastry Art Design to which I have referred.

35 The second submission dealt with adverse information raised by the Tribunal concerning the evidence of Mr Ploumidis. In those submissions, reliance was placed on the evidence in the three statements, particularly the statement of Mr Karfut, the manager of Pastry Art Design at the time (paras 2 and 4).

Application to review the Tribunal decision

36 Mr Salopal applied to the Federal Circuit Court to review the Tribunal's decision.

37 On an application for the review of a decision of the Tribunal in relation to migration decisions, the Federal Circuit Court has the same original jurisdiction as the High Court: s 476(1) of the *Migration Act 1958* (Cth). For present purposes, that required the identification of jurisdictional error in respect of the Tribunal decision before the Federal Circuit Court could grant relief.

38 In order to demonstrate jurisdictional error, it must be shown that the Tribunal has acted outside its power and authority or failed to exercise its statutory responsibilities. Jurisdictional error, in the sense relevant here, consists of a material breach of an express or implied condition of the valid exercise of a decision-making power conferred by the *Migration Act*: *Wei v Minister for Immigration and Border Protection* [2015] HCA 51; (2015) 257 CLR 22 at [23]. It is a failure to comply with one or more statutory preconditions or conditions that must be met or observed in order for the decision-maker to make a decision that is within the scope of authority which the statute confers on the decision-maker: *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34 at [23]-[24]. So, there is jurisdictional error if a repository of statutory power ventures outside the boundaries of the power entrusted by statute.

39 The application for judicial review by the Federal Circuit Court raised five grounds and Mr Salopal was given leave to add one further ground during the course of the hearing. Although he had legal assistance in preparing the grounds of the application, Mr Salopal appeared in person at the hearing. The reasons of the Federal Circuit Court judge record that Mr Salopal had very little to say about the written grounds.

40 The grounds raised a claim that the Tribunal fell into jurisdictional error by making a finding that was unreasonable, illogical or irrational or for which there was no evidence (ground 4). Particular (d) to that ground stated, amongst other things, that the Tribunal 'did not take into account Mr Ploumidis's evidence in relation to the Applicant was supported by the evidence of the Applicant's co-worker Angela Plimblet and Pastry Art Manager, Michael Karfut and the Applicant's friend, Gaur Singh'.

41 In relation to particular (d), the Federal Circuit Court judge referred to the statement by the Tribunal at [62] of its reasons (quoted above) and said that the reference to considering the entirety of the evidence appeared to be a reference to the evidence of Mr Karfut, Ms Pimblet, and Mr Gaur. (It is to be noted that there were statements provided by other witnesses that were before the Tribunal and the evidence of those witnesses was not specifically addressed by the Tribunal.)

42 The Federal Circuit Court judge then reasoned at [47]-[49] as follows:

The Tribunal specifically said at paragraph 62 of its reasons for decision that it had considered the entirety of the evidence before it, from the applicant, Mr Ploumidis and a number of other witnesses. This appears to be a reference to the evidence of Mr Karfut, Ms Pimblet and Mr Gaur. The Tribunal then said in paragraph 63 of its reasons for decision:

*The Tribunal accepts that the applicant did some work at Pastry Art Design. This is not inconsistent with Mr Amarante's evidence to police that some, if not all, students who obtained false references did **some** work, but less than 900 hours of work, for the respective employers. (emphasis added)*

In making this finding, the Tribunal clearly did take into account the evidence of the three co-workers. The evidence of Ms Pimblet and Mr Singh did not specify how many hours the applicant worked at Pastry Art Design. There was nothing further that the Tribunal could have taken into account in relation to these two witnesses.

The evidence of Mr Karfut went further, in that it included a claim that the applicant did work 900 hours for Pastry Art Design. However, the Tribunal rejected that claim for reasons that it gave. That conclusion was open to the Tribunal on the evidence before it. It cannot be said that the conclusion was irrational or unreasonable or unsupported by any evidence.

43 There was a further ground which included a claim that the Tribunal failed to consider Mr Salopal's claims or evidence (ground 5). It included particular (c) which set out that in support of his claim, Mr Salopal had 'provided detailed and uncontested evidence regarding his work at Pastry Art, a statutory declaration from a co-worker, a statutory declaration from a Pastry Art Manager and the evidence of Mr Ploumidis, all of which confirmed [Mr Salopal] had completed 900 hours of work experience at Pastry Art'. The ground then stated that the

Tribunal had failed to adequately consider the substantial evidence put forward in relation to the appellant's work experience, 'particularly that there were numerous reliable third parties providing support to his claims'.

44 As to this ground the primary judge found that it was 'misconceived' as the question for the Tribunal was whether there was any evidence that Mr Salopal had provided a bogus document and there was clearly ample evidence to that effect. However, the difficulty with that approach was that the Tribunal (as noted above) reasoned only from a finding that Mr Salopal had not worked 900 hours at Pastry Art Design as the basis for its conclusion that the TRA skills assessment was a bogus document. Therefore, its finding about whether there was evidence of a bogus document depended entirely upon its conclusion 'on all the evidence' that Mr Salopal had not worked 900 hours. Therefore, the reasoning by the primary judge did not reflect the manner in which the Tribunal had approached the matter.

45 Further, it is difficult to see how the Tribunal could have reasoned that the TRA skills assessment was a bogus document as defined in the *Migration Act* without first reaching a view as to whether Mr Salopal had worked 900 hours.

46 These and all other grounds of appeal were rejected by the Federal Circuit Court.

Initial grounds of appeal in this Court

47 In his notice of appeal in this Court, Mr Salopal raised two grounds.

48 By his first ground, Mr Salopal claimed that the Federal Circuit Court misapplied the test in *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39 by preferring the evidence of Mr Amarante over Mr Ploumidis. The decision in *SZIAI* concerned the circumstances in which there may be jurisdictional error if the Tribunal failed to make an obvious inquiry. The plurality stated the following general principle at [25]:

It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error. (footnote omitted)

49 As to these matters, the Federal Circuit Court found at [33]-[34]:

The applicant also took issue with the Tribunal not asking Mr Ploumidis why he said that some of his work experience students, including the applicant, were genuine while others were part of the fraudulent scheme created by Mr Amarante.

Mr Ploumidis gave evidence by telephone to the Tribunal. Clearly, any answer that Mr Ploumidis gave to that proposed question could not have been conclusive as his credibility was in question as a person who had participated in the fraudulent scheme created by Mr Amarante. As such, the proposed question does not meet the *SZIAI* criteria.

The applicant also took issue with the Tribunal not issuing a summons to Mr Amarante to take evidence from him to confirm whether any of the reference letters on his USB were genuine. In my view, this was not an obvious enquiry. It makes no sense that Mr Amarante, as the mastermind of a fraudulent scheme to create false work references for students, would have genuine work references for students in his possession. In any event, any evidence Mr Amarante gave to the Tribunal would be questionable because he had pleaded guilty to perpetrating a very significant fraud. This matter does not fit within the *SZIAI* criteria.

50 50 The Federal Circuit Court was correct in concluding that the matters raised did not demonstrate a failure to make an obvious inquiry about a critical fact.

51 51 By his second ground, Mr Salopal said that he was not given a copy of a summons dated 18 May 2015 that had been issued by the Tribunal so he was unable to see whether it was a valid exercise of the Tribunal's power under s 363(3) of the *Migration Act*.

52 52 Under s 363, the Tribunal may, amongst other things, summon a person to produce to the Tribunal documents or things referred to in the summons.

53 53 The summons sought production of the following documents:

- • Any document or record that confirms that the applicant's work reference from Mr Emmanuel Ploumidis (Pastry Art Design) was found in the possession of Mr Carmine Amarante as a result of the search warrant executed at Mr Amarante's residential premises and that this work reference was a court exhibit in the proceedings brought against Mr Amarante.
- • Any document or record that confirms that the applicant's work reference was similar in content and format to any false work references found in the possession of Mr Carmine Amarante as a result of the search warrant executed at his residential premises.
- • Any record (including TRIM or 1SCE Record, file note, investigation report, signed statement etc.) that led to the delegate's finding that the applicant's work reference from may have been fraudulently issued to him.
- • Any record relating to any decision by Trades Recognition Australia to cancel the Pre-Migration Skills Assessment Application reference TRA 08/106205837, or any other document reflecting that such a decision has been made.

54 54 No concern in relation to the summons to produce documents was raised before the Federal Circuit Court.

Mr Salopal did not identify any respect in which it was alleged that there was a failure to comply with the *Migration Act* concerning the form of the summons or the manner of its issue. The material before me on appeal disclosed no such error. A summons to produce documents may be issued by the Tribunal for the purpose of the review of a decision: s 363(3). The issue of a summons is not a pre-condition to the exercise of jurisdiction.

There is no merit in Mr Salopal's second written ground.

Grounds raised in the course of hearing

When the matter was first listed for hearing, in the course of oral argument concerning the summons issued under s 363(3), it was not clear whether the documents that had been obtained in response to the summons had been provided to Mr Salopal for the purposes of the hearing. If they had not been provided to him, then an issue may arise as to whether there had been a failure to afford procedural fairness.

The Minister was invited to provide further evidence and submissions on those matters.

In addition, in support of his appeal, Mr Salopal provided short written submissions and oral submissions. In those submissions, there was a complaint about the way the Tribunal had dealt with the evidence of Mr Karfut, Ms Pimblet and Mr Singh. As I have noted, this was a matter that had been raised in support of the judicial review proceedings in the Federal Circuit Court, but had not been upheld.

When these matters were considered at the hearing, the Minister placed reliance upon the terms of PIC 4020(1). In particular, it was submitted that the requirement was not satisfied if there was some evidence that the TRA skills assessment provided in support of the visa application was a bogus document.

The Minister was afforded an opportunity to make further written submissions as to whether the approach by the Tribunal to the evidence of those witnesses gave rise to jurisdictional error.

Further oral argument was then heard at an adjourned hearing. I deal with each of these matters below.

Documents produced in response to the subpoena

63 63 As to the factual position, the Minister filed no evidence, but made submissions based upon the documents in the appeal book. Those documents showed that the Tribunal gave notice on 18 May 2015 that a hearing of Mr Salopal's review application was to be convened on 10 June 2015. Also on 18 May 2015, the Tribunal issued the summons to the Secretary, Department of Immigration and Border Protection. An email referring to the production of the documents is dated 27 May 2015. Certain documents in the appeal book were identified by the Minister as the documents produced in response to the summons.

64 64 Lawyers acting for Mr Salopal provided written submissions for the hearing on 3 June 2015. The submissions said that the lawyers did not have access to purported documents prepared by Mr Amarante (referred to in the USB) and 'it is impossible for the Applicant to compare such documents to his own work reference'. The hearing was held on 10 June 2015. On 12 June 2015, the Tribunal provided to Mr Salopal's lawyers a letter inviting a response to certain adverse information. The information included the following:

At the hearing, when asked about the reason why a very similar reference letter may have been found on the premises of a certain Mr Carmine Amarante, you suggested that Mr Amarante may have obtained your name and details from the owners of, or other teachers at Della International College where he was a teacher and you were a student up until 2007.

65 65 It appears from this part of the letter, that a document obtained in response to the summons may have been put to Mr Salopal at the hearing on 10 June 2015 without any prior disclosure of that material to Mr Salopal or his lawyers.

66 66 A further submission was provided by Mr Salopal's lawyers on 10 July 2015. It described errors in the ABN and phone number in the reference letter from Pastry Art Design that Mr Salopal had provided to TRA in support of his skills assessment. It stated that a copy of the letter obtained from TRA in response to a freedom of information request had the same errors. The submission then stated:

We understand that the copy similar to the Review Applicant's letter which was found on [Mr Amarante's] USB did not exhibit the same errors in the ABN and phone number.

67 67 These submissions suggest that the USB version was not provided to Mr Salopal's lawyers before the hearing on 10 June 2015.

68 68 The reasons provided by the Tribunal on 17 July 2015 record that a version of the reference letter seized from Mr Amarante was put to him, apparently for the first time, at the hearing on 10 June 2015 (para 30).

69 69 From these matters it appears that relevant documents produced in response to the summons were not provided to Mr Salopal when they were obtained and were put to Mr Salopal for the first time at the hearing. However, he was afforded an opportunity after the hearing to provide submissions to aspects of those documents (and other matters) that were considered to be adverse to Mr Salopal's application.

70 70 Although the matter was not dealt with formally as an application to raise a ground of appeal not argued below, it should be approached on that basis. The issue emerged in the course of argument and concerned a matter not pursued before the Federal Circuit Court.

71 71 The principles governing the exercise of discretion to grant leave to raise new grounds on appeal were summarised in *Murad v Assistant Minister for Immigration and Border Protection* [2017] FCAFC 73; (2017) 250 FCR 510 (Griffiths, Mortimer and Perry JJ) at [19]. The Court must be satisfied that it is expedient and in the interests of justice for arguments which were not before the primary judge to be considered for the first time on appeal: *O'Brien v Komesaroff* [1982] HCA 33; (1982) 150 CLR 310 at 319.

72 72 Further, if a review ground is raised for the first time on appeal and leave is given to raise the point then the respondent is denied a right to appeal because any further appeal lies only by grant of special leave by the High Court: *AAMI5 v Minister for Immigration and Border Protection* [2015] FCA 804; (2015) 231 FCR 452 at [14] and *SZUGL v Minister for Immigration and Border Protection* [2015] FCA 868 at [18].

73 73 As to the merits, the review by the Tribunal was to be undertaken on the basis that Division 5 of Part 5 of the *Migration Act* was an exhaustive statement of the requirements of the natural justice hearing rule 'in relation to the matters it deals with': s 357A. Provisions of this kind require close consideration of the matters that are dealt with in the sections to which reference is made in order to determine what is dealt with in those sections (and therefore governed by s 357A): *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; (2010) 241 CLR 252 at [35]-[42].

74 74 Within those sections, s 362A(1) provides that the applicant and any assistant under s 366A are entitled to have access to any written material, or a copy of any written material,

given or produced to the Tribunal for the purposes of the review. However, there must be a request invoking the entitlement. There is no general obligation on the Tribunal arising from s 366A to supply or provide all documents it holds relating to a particular review: *Singh v Minister for Immigration and Border Protection* [2017] FCAFC 220; (2017) 255 FCR 135 at [46]. Further, as s 366A deals with the matter of provision of material given or produced to the Tribunal it is an exhaustive statement of the natural justice hearing rule in relation to that matter.

75 75 As I have noted, Mr Salopal was given an opportunity to comment on matters considered to be adverse to his claim as required by s 359A. No complaint is raised about how that occurred.

76 76 In those circumstances, there appears to be little merit in any complaint about the manner in which the Tribunal approached the provision of the documents obtained in response to the summons.

77 77 Further, Mr Salopal was legally represented throughout the course of the above events. No issue was raised by his lawyers about these matters before the Tribunal, nor in the grounds of review in the Federal Circuit Court which were prepared by Mr Salopal's lawyers. In particular, there was no suggestion that a request was made, but documents were not provided.

78 78 For the above reasons, I decline to entertain an appeal ground concerning the production of documents in response to the summons.

The Tribunal's approach to evidence supporting Mr Salopal's account

79 79 As I have noted, the Tribunal did not address the specific content of the evidence of three witnesses who provided statements supporting Mr Salopal's account that he worked at Pastry Art Designs for more than 900 hours. Mr Salopal raised a complaint about that aspect both before the Federal Circuit Court and in his submissions in this Court. In the Federal Circuit Court that complaint was couched both in terms of unreasonableness and a claim that there had been a failure by the Tribunal to perform its statutory task.

80 80 As to those matters, the Minister made two submissions. First, it was said that by reason of the terms of PIC 4020(1), there was a failure to meet that requirement if there was evidence of a bogus document having been submitted for the purposes of the visa application

and the Tribunal did not need to make a finding as to whether the document was a bogus document. It was said that the reasons of the Tribunal needed to be viewed in that context.

81 81 Second, the Minister relied upon the statement by the Tribunal that it had considered 'the totality of the evidence'. It also relied upon the statement of the Tribunal (at para 62) that it had 'considered the entirety of the evidence before it, from the applicant, Mr Ploumidis and a number of other witnesses, the applicant's 'calendar' and recipe book and photos'. It submitted that these statement showed that the Tribunal did consider the evidence of the three witnesses relied upon by Mr Salopal even though the Tribunal made no specific reference to the content of those statements.

82 82 I deal with these two submissions separately below.

The reference to 'no evidence' in PIC 4020(1)

83 83 As noted above, PIC 4020(1) requires that there be no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to (a) the application for the visa; or (b) a visa that the applicant held in the period of 12 months before the application was made.

84 84 The use of the term 'evidence' rather than 'information' in PIC 4020(1) means that the requirement is directed to instances where there is material before the Minister (or the Tribunal on review) that is sufficiently probative to lead to the conclusion that a bogus document has been given in support of the visa application: *Sun v Minister for Immigration and Border Protection* [2016] FCAFC 52; (2016) 243 FCR 220 at [45]. To similar effect is *Verma v Minister for Immigration and Border Protection* [2018] FCAFC 87 where at [37] the Court said as to a decision concerning PIC 4020(1) that the Tribunal 'only needed to be satisfied that there was some probative evidence that the appellant had provided a bogus document'.

85 85 An issue arises as to whether the 'no evidence' aspect of PIC 4020(1) applies only to the 'given, or caused to be given' element of the requirement or whether it also applies to the 'bogus document' element. In particular, if there is probative evidence that a document was given to one of the specified parties by the applicant in support of a visa application, is PIC 4020(1) still not satisfied if there is some probative evidence of the bogus character of the

document or must the Minister be affirmatively satisfied that that the document is a bogus document.

86 86 In resolving this question, it must be noted that the definition of bogus document is met if the Minister 'reasonably suspects' that a document is of the character described in the definition (for present purposes being that it was obtained because of a false or misleading statement). Considered in that context, it would be odd if the requirement imposed by PIC 4020(1) was to the effect that there must be no probative evidence in respect of each document given to the Minister that it is a document that the Minister reasonably suspects was obtained because of a false or misleading statement. Given that the visa application is to be made to the Minister and is the occasion for the Minister to consider whether a document is bogus, it is difficult to conceive how the Minister (or the Tribunal on review) would perform the mental gymnastics required in order to be satisfied that there is no evidence of a reasonable suspicion by the Minister (or the Tribunal) about a document that has been provided in support of the very application which provides the occasion to evaluate whether the document is bogus. In short, it would be odd if PIC 4020(1) required there to be no evidence of a reasonable suspicion when the suspicion was not required to be formed until the application was heard. A requirement that there be no evidence of a state of suspicion which is itself to be formed in the course of the determination to be made by the person to whom an absence of evidence of that state of suspicion must be demonstrated would have a Kafkaesque quality.

87 87 Also relevant to the construction of the scope of the 'no evidence' language in PIC 4020(1) is the fact that it also applies in cases where there is an issue whether information that is false or misleading in a material particular has been given in relation to the application for the visa or a visa held by the applicant in the previous 12 months. If the 'no evidence' terminology applies to both the question whether the applicant has given or caused to be given the relevant information as well as to whether that information is false or misleading in a material particular then PIC 4020(1) would not be met where there was some probative evidence that the information was false or misleading irrespective of whether the Tribunal, on evaluating all of the information, did not reasonably suspect that the information was false or misleading. It would reduce the inquiry to a question whether there was some probative evidence on the issue rather than an evaluation whether the evidence led to a reasonable suspicion that the document had been obtained because of a false or misleading statement.

88 88 Therefore, the form of the definition of bogus document (as well as the overall structure of PIC 4020(1)), provide strong contextual support for the conclusion that PIC 4020(1) requires the Minister (or the Tribunal on review) to form a view about whether a document provided in support of a visa application is a bogus document and, if the reasonable suspicion standard is met in respect of the document, then consider the available material concerning how the document came to be provided to the Minister. On that approach, there must be no evidence before the Minister (or the Tribunal) that the applicant 'has given, or caused to be given', to any of the named persons in PIC 4020(1) a document that is otherwise determined to be a bogus document.

89 89 The application of PIC 4020 has been considered in a number of decisions of this Court, most recently in *Singh v Minister for Immigration and Border Protection* [2018] FCAFC 52 where Griffiths and Moshinsky JJ reviewed the authorities (at [78]-[128]). Those authorities include *Trivedi v Minister for Immigration and Border Protection* [2014] FCAFC 42; (2014) 220 FCR 169; *Patel v Minister for Immigration and Border Protection* [2015] FCAFC 22; *Arora v Minister for Immigration and Border Protection* [2016] FCAFC 35; (2016) 238 FCR 153 and *Zhang v Minister for Immigration and Border Protection* [2016] FCA 921. Some of those cases are concerned with how PIC 4020 is to be applied where there is a claim that a person other than the applicant has been responsible for the false or misleading character of a document presented to the Minister. Others have involved claims that the fraud of third parties (migration agents or other representatives) has meant that the application for the visa was itself a nullity (a point that has significance because of provisions in the *Migration Act* that prevent a person from seeking a visa for a number of years where a visa has been refused on the basis that it was supported by a bogus document).

90 90 After reviewing the authorities in *Singh*, Griffiths and Moshinsky JJ concluded at [144]:

- (4) Where an issue of the proper construction or application of PIC 4020 is raised, *Trivedi* and *Patel* authoritatively state that where a visa applicant has given or caused to be given to a relevant decision-maker a document which is a “bogus document” as defined, or information that is false or misleading in a material particular as defined, to determine whether PIC 4020 is satisfied or not, it is not necessary to show knowing complicity by the visa applicant as long as the material is purposely untrue.

...

- (8) Where there is some evidence to indicate that a visa applicant may not satisfy PIC 4020(1) and the visa applicant claims that his or her migration agent or a

third party engaged in fraudulent conduct and provided in support of the person's visa application a bogus document, or information that is false or misleading in a material particular, and the visa applicant claims that his or her visa application is therefore a nullity, the visa applicant in a judicial review case carries the onus of establishing that:

- (a) the migration agent or third party was responsible for the fraudulent conduct;
- (b) at the relevant times, the visa applicant had no knowledge of and was not complicit in the fraudulent conduct carried out by the migration agent or third party;
- (c) the visa applicant was not indifferent as to whether the migration agent or third party engaged in the fraudulent conduct in the visa application process; and
- (d) the fraud affected decision-making under the *Act*.

91 91 It is to be noted that these conclusions are not expressed in terms that would support the view that PIC 4020(1) requires there to be no probative evidence at all that could support the conclusion that a document given to the Minister in support of the application was a bogus document. Rather, they concern the extent of involvement on the part of the applicant in the provision to the Minister of a document that is bogus in character. Of course, the views are expressed in terms that reflect the fact that in those cases there was no real issue that the relevant document was a bogus document. Nevertheless, I could discern no statement in the cases considered in which a view was expressed to the effect that the 'no evidence' aspect of PIC 4020(1) extends beyond the requirement that the visa applicant has been the one who has given the document to the relevant party for the purposes of the visa application.

92 92 Other recent Full Court decisions concerning PIC 4020(1) do not suggest that the requirement has been approached in other cases on the basis that there must be no evidence that a document provided in support of an application is a bogus document: see, for example: *Minister for Immigration and Border Protection v Aulakh* [2018] FCAFC 91 (where there was an affirmative finding by the Tribunal that the document was false: at [7]-[8]); *Verma* (where the Tribunal found the document to be a bogus document and it followed that PIC 4020(1) was not satisfied: at [3]); and *Ashraf v Minister for Immigration and Border Protection* [2018] FCAFC 50 (where the Tribunal made a finding in terms of the definition of bogus document to the effect that it reasonably suspected that the TRA skills assessment was obtained by a false or misleading statement: at [38]). In none of those decisions was there any suggestion that the issue should be approached by the Tribunal asking whether there is any probative evidence that the document in question was a bogus document.

93 Therefore, for the above reasons, I do not accept the submission advanced for the Minister that where there is evidence that results in the Tribunal on review having a reasonable suspicion that the document in question was obtained because of a false or misleading statement, then the 'no evidence' requirement for PIC 4020(1) is not met.

94 It follows that, in the present case there were two matters for the Tribunal to determine concerning the TRA skills assessment obtained on the basis of the Pastry Art Design letter. First, whether the TRA skills assessment was a bogus document (a matter which turned upon whether the Tribunal reasonably suspected that it was obtained because of a false or misleading statement). Second, whether there was no probative evidence that Mr Salopal had given that document to any of the parties listed in PIC 4020(1) in relation to either his visa application or any visa that he had held in the previous 12 months.

95 Importantly, the first matter could not be decided adversely to Mr Salopal simply on the basis that there was some evidence that the TRA skills assessment was a bogus document. Rather the Tribunal had to consider, on all the evidence, whether it reasonably suspected that the TRA skills assessment was obtained because of a false or misleading statement, namely the matters stated in the Pastry Art Design letter.

96 As I have noted above at [20]-[21], the Tribunal's decision did not rest upon the view contended for by the Minister that where there is evidence that results in the Tribunal on review having a reasonable suspicion that the document in question was obtained because of a false or misleading statement then the 'no evidence' requirement for PIC 4020(1) is not met (a submission I have rejected). Rather, the Tribunal made an affirmative finding that Mr Salopal did not complete 900 hours of work at Pastry Art Design. It based its decision that PIC 4020(1) had not been met upon that finding. It is in that context that the significance of the Tribunal's reasoning concerning the three witnesses relied upon by Mr Salopal is to be considered.

The references in the Tribunal's reasons to considering the totality of the evidence

97 The Tribunal was required not only to make a decision of the kind required by the *Migration Act* but also to undertake a review of the kind that would be expected of an independent statutory Tribunal of the character established by the *Administrative Appeals Tribunal Act 1975* (Cth): *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184; (2003) 236 FCR 593 at [44]-[45]. In performing the review task, the Tribunal was required to consider claims expressly raised or that are apparent

on the material before the Tribunal: *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* [2004] FCAFC 263; (2004) 144 FCR 1 at [55]-[63].

98 98 Where a substantial, clearly articulated argument is advanced in support of an application which argument, if accepted, would or could be dispositive of the decision then, subject to the particular statutory context, the error may be characterised as jurisdictional error: *Viane v Minister for Immigration and Border Protection* [2018] FCAFC 116 at [28]-[30] (Reeves and Rangiah JJ), [75]-[77] (Colvin J); see also *Soliman v University of Technology, Sydney* [2012] FCAFC 146; (2012) 207 FCR 277 at [55]-[56].

99 99 In that context, the question raised by Mr Salopal's submissions is whether his reliance upon the evidence of the three corroborative witnesses was a claim of a kind that the Tribunal in discharging its statutory function was required to consider and if so whether that statutory function was properly discharged, alternatively whether the manner in which the Tribunal dealt with that evidence meant that the Tribunal's decision was reviewable on unreasonableness grounds.

100 100 In considering that question, there may be due regard to the reasons. The Tribunal is required to comply with s 368 of the *Migration Act* concerning the provision of a written statement of its decision. A written statement under s 368 must, amongst other things, set out the findings on any material questions of fact, and refer to the evidence or any other material on which the findings of fact were based. Performance of the statutory obligation under s 368 will often require the Tribunal to state in its reasons whether it has rejected or failed to accept evidence going to a material issue: see *Re The Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* [2000] HCA 1 at [65] (McHugh J).

101 101 A statement to the effect that the Tribunal has considered the evidence overall does not shield from scrutiny such consideration as was given in fact to the evidence going to a centrally relevant submission. As was stated by the Full Court in *Minister for Immigration and Border Protection v Nguyen* [2017] FCAFC 149; (2017) 254 FCR 522 at [32] (Flick, Barker and Rangiah JJ):

A statement that a Minister for example has "*considered all relevant matters*" and "*all other evidence*" may be said to fall short of an adequate reference to the evidence and falls short of putting a party in a position whereby they can "*connect*" in any meaningful manner the "*findings*" to the evidence (cf. *King v Minister for Immigration and Border Protection* [2014] FCA 766 at [37], (2014) 142 ALD 305 at 320 per Flick J. See also: *Salahuddin v Minister for Immigration and Border Protection* [2013] FCAFC 141 at [22], (2013) 229 FCR 290 at 297 to 298 per Flick J.

It is "*not only prudent but also desirable*" to explicitly deal with such matters: [2013] FCAFC 141 at [31], (2013) 229 FCR 290 at 299 per Katzmann J. Wigney J agreed: [2013] FCAFC 141 at [34], (2013) 229 FCR 290 at 300). It is necessary "*to explain what evidence [the Tribunal] has accepted or rejected*": cf. *TelePacific Pty Ltd v Federal Commissioner of Taxation* [2005] FCA 158 at [50] to [53], (2005) 218 ALR 85 at 95 to 96 per Sackville J.

102 102 Further, the precise terms in which the statutory obligation of the Tribunal to give reasons is expressed provides a critical framework in considering what, if any, significance should be attached to the failure of a decision-maker to make findings on every matter of fact which is objectively material to its decision: *Malek Fahd Islamic School Ltd v Minister for Education and Training (No 2)* [2017] FCA 1377 at [42] (Griffiths J).

103 103 As I have noted, the Tribunal was required to set out the evidence or other material on which findings of fact were based. Provisions of this kind impose an obligation to set out in the reasons the subjective thought processes of the decision-maker: *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323 at [68] (McHugh, Gummow and Hayne JJ). In that context, a failure to advert to the content of particular evidence may indicate that the Tribunal did not consider the matter to be material: *Yusuf* at [5] (Gleeson CJ).

104 104 The Tribunal dealt with the evidence of Mr Salopal and Mr Ploumidis as well as the statement of Mr Amarante at some length (paras 19 to 61). In the course of those reasons, the Tribunal made no reference to the content of the evidence of the three witnesses relied upon by Mr Salopal. One of those witnesses gave evidence that they worked with Mr Salopal at the relevant time and that he completed over 900 hours (Mr Karfut). Another gave evidence that Mr Salopal worked almost one year at Pastry Art Design (Ms Pimblet). This was important evidence going to the central issue. Reasonable conclusions about whether to accept Mr Salopal's account could not be reached without weighing this evidence because it was directly contradictory to a conclusion that Mr Salopal had not worked 900 hours.

105 105 The general manner in which reference was made to the evidence in the reasons of the Tribunal indicates that the Tribunal did not consider the evidence of the three witnesses to be of particular significance for Mr Salopal's case. This approach did not reflect the way in which the matter had been presented on behalf of Mr Salopal, particularly in submissions made in response to the letter from the Tribunal indicating material that may be adverse to the claim made by Mr Salopal about the hours that he had worked at Pastry Art Design.

106 It is to be noted that the Tribunal, in deciding whether a bogus document had been given by Mr Salopal in support of his visa application, was only required to form a view as to whether it reasonably suspected that the TRA skills assessment was obtained because of a false or misleading statement. Further, the question whether there is a reasonable suspicion as to any of the matters in the definition of bogus document involves an evaluative element: *Gill v Minister for Immigration and Border Protection* [2017] FCAFC 51; (2017) 250 FCR 309 at [56]-[58] and [90]-[92] (Griffiths and Moshinsky JJ). These are matters that are entrusted to the Tribunal for adjudication.

107 However, the issue raised by Mr Salopal is not whether the Tribunal properly formed a reasonable suspicion, which would invite merits review. Rather, the question is whether the Tribunal discharged its statutory function to consider the significant claims raised by Mr Salopal and to provide reasons in respect of those claims. A significant claim raised by him was that his evidence should be accepted on the key question as to whether he had worked 900 hours at Pastry Art Design because it was corroborated by other witnesses.

108 The form in which the reasons of the Tribunal were expressed leads me to conclude that this significant aspect of his claim was not considered. Therefore, the Federal Circuit Court was in error in failing to uphold the review grounds raised by Mr Salopal in respect of that aspect of the Tribunal's decision. It follows that, on that ground, the decision of the Tribunal should be set aside and the matter should be remitted to the Tribunal. As the issue considered by the Tribunal involved making findings adverse to the credibility of Mr Salopal's account, the matter should be remitted to the Tribunal differently constituted.

109 Given those conclusions, it is strictly unnecessary to consider whether review is also available on grounds of unreasonableness. However, in my view, for the following reasons, the Federal Circuit Court also should have upheld that ground of Mr Salopal's application for review.

110 The requirement that a statutory power be exercised within the bounds of reasonableness is an implied condition of the statutory conferral of the power: *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30 at [53] (Gageler J), [80] (Nettle and Gordon JJ) and [131] (Edelman J). The precise content of that which is required must be determined as a matter of statutory construction of the relevant provisions. Part of that process will involve a consideration of the nature of the repository of the power: *SZVFW* at [51]-[53] (Gageler J), [84] (Nettle and Gordon JJ) and [134]-[135] (Edelman J).

Therefore, whether the decision in a particular case meets the required standard of reasonableness (and is therefore within power) must be decided by the court on review based upon a consideration of the facts of the particular case: *SZVFW* at [61]-[70] (Gageler), [84] (Nettle and Gordon JJ) and [140]-[141] (Edelman J).

As to the Tribunal as a repository of power, I noted the following matters in *SZQPY v Minister for Immigration and Border Protection* [2018] FCA 359 at [24]:

By entrusting the decisions on review to members of the Tribunal, the legislature must have intended that the decisions to be made would have the character of decisions to be made by the Tribunal generally. Members of the Tribunal must be a judge or a legal practitioner who has been enrolled for at least five years or a person with special knowledge or skills relevant to the duties of a member: s 7 of the AAT Act. They must take an oath to faithfully and impartially perform the duties of the office of a member of the Tribunal: s 10B of the AAT Act. They are independent of any other part of the Executive and do not form part of a Ministerial department. They must disclose any conflict of interest and must not take part in any proceeding in which they have a conflict without the consent of the President of the Tribunal: s 14. The Tribunal has a registry and staff for that purpose. A person commits an offence if the person engages in conduct that obstructs or hinders the Tribunal: s 63.

Factual findings of the Tribunal must be rationally made and based on probative material and logical grounds: *CQG15 v Minister for Immigration and Border Protection* [2016] FCAFC 146; (2016) 253 FCR 496 at [40]-[55]. The approach to be applied in considering whether there has been a jurisdictional error of that kind was recently summarised in *DAO16 v Minister for Immigration and Border Protection* [2018] FCAFC 2 at [30].

In some cases, unreasonableness may be inferred from the result on the basis that a person properly undertaking the statutory task could not have reached the particular result: *Avon Downs Pty Ltd v Federal Commissioner of Taxation* [1949] HCA 26; (1949) 78 CLR 353 at 360. However, where reasons are available, the focus should be upon those reasons and where they provide an evident and intelligible justification for the decision, it is unlikely that the decision could be considered legally unreasonable: *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; (2014) 231 FCR 437 at [47].

As Allsop CJ said (Wigney J agreeing) in *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; (2016) 237 FCR 1 at [12], it is 'crucial to remember' the task is not to assess what the court thinks is reasonable (as if in an appeal concerning breach of duty of care); rather, the task is to evaluate the quality of the decision, by reference to the statutory source of the power. At all times it must be borne in mind that '[s]omeone

who disagrees strongly with someone else's process of reasoning on an issue of fact may express such disagreement by describing the reasoning as "illogical" or "unreasonable", or even "so unreasonable that no reasonable person could adopt it". If these are merely emphatic ways of saying that the reasoning is wrong, then they may have no particular legal consequence': *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; (1999) 197 CLR 611 at [40] (Gleeson CJ and McHugh J).

116 116 Applying these principles to the present case, the Tribunal's reasons show that it reached a conclusion on the key issue, namely whether Mr Salopal did work 900 hours at Pastry Art Design, by focussing on the evidence given by Mr Salopal and Mr Ploumidis about the reference letter and how it was obtained.

117 117 For reasons I have given, the manner in which the Tribunal expressed its reasons indicated that the Tribunal did not bring the evidence of the three independent witness to bear in any meaningful way in reaching its conclusion on the key area of factual dispute. Having regard to the fact that it was the principal factual matter in issue (as described by the Tribunal itself at para 21), a statutory decision-maker of the character of the Tribunal would be expected to specifically address the content of the evidence of the three independent witnesses and include the detail of that evidence in forming a conclusion on that issue. To advert to the existence of other evidence without the content of the statements from the three witnesses who worked with Mr Salopal at Pastry Art Design at the relevant time being considered in any way (as indicated by the absence of reasons being provided as to why that evidence was not to be preferred) was to fall short of the statutory standard of reasonableness which had to be met by the Tribunal as a repository of the power to undertake a review of the Minister's decision concerning Mr Salopal's application for a visa.

118 118 As to costs, Mr Salopal appeared on his own behalf. I was not informed of any costs that he has incurred that might be recovered. However, as I have noted, it does appear that he was represented prior to the hearing in the Federal Circuit Court. In those circumstances, I will reserve liberty to Mr Salopal to apply in respect of cost orders in the appeal and in respect of the proceedings in the Federal Circuit Court.

I certify that the preceding one hundred and eighteen (118) numbered paragraphs are a true copy of the Reasons for Judgment herein

of the Honourable Justice Colvin.

Associate:

Dated: 28 August 2018